

EMPLOYER STATUS DETERMINATION

Beard Land and Investment Company

This is a determination as to the employer status of Beard Land and Investment Company (Beard) under the Railroad Retirement Act (RRA) (45 U.S.C. §231 et seq.) and the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. §351 et seq.). Beard has not previously been held to be an employer under the Acts.

The evidence is that Beard was incorporated in 1926 as a close corporation. Prior to April 1992, Beard owned 100 percent of the stock of the Modesto Interurban Railway (Modesto Interurban), which in turn owned all the stock of Modesto Empire and Traction Company (Modesto Traction); Modesto Traction owned Beard Land Improvement Company (Beard Improvement). Modesto Traction owned track and equipment, and operated rail carrier service. Modesto Interurban and Beard Improvement owned only right of way and equipment. In Beard Land and Investment Co. and Modesto Empire and Traction Co., Merger Exemption, Modesto Interurban Railway, ICC Finance Docket 31965, 57 Fed. Reg. 13119 (April 15, 1992), the Interstate Commerce Commission exempted from regulation a merger of Modesto Interurban into Modesto Traction, with the surviving company to be renamed Modesto and Empire Traction (Modesto and Empire). Currently, Beard owns Modesto and Empire, a rail carrier, and Del Este Water, a water utility company. Beard itself is a holding company with no employees.

Section 1 of the RRA defines "employer" to include:

(i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. (45 U.S.C. §231(a)(1)(i) and (ii)).

Section 1 of the RUIA (45 U.S.C. § 351) and section 3231 of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231) contain essentially the same definition.

A recent decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the RRTA held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within

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the meaning of §3231. Union Pacific Corporation v. United States, 5 F. 3d 523 (Fed. Cir., 1993).

The facts in the Union Pacific case are indistinguishable from those presented by Beard. Accordingly, a majority of the Board determines that Beard Land and Investment Company is not and has never been an employer covered by the RRA and the RUIA, because it is not under common control with its rail carrier subsidiaries.

An appropriate Form G-215 is attached.

Glen L. Bower

V. M. Speakman, Jr. (Dissenting
opinion attached)

Jerome F. Kever

SABartholow:TWSadler:KTBlank
BEARD377.COV

TO: The Board

FROM: General Counsel

SUBJECT: Beard Land and Investment Company
Employer Status

Attached is a draft determination that Beard Land and Investment Company is not a covered employer.

Beard Land and Improvement, as parent of its rail carrier subsidiary, is in the same position as the Union Pacific Corporation with respect to the Union Pacific Railroad. In our judgement the recent decision Union Pacific Corporation v. United States under the Railroad Retirement Tax Act requires a determination that Beard Land and Investment is not under common control with its rail carrier subsidiary, and therefore is not a covered employer.

Catherine C. Cook

Attachment

SABartholow:TWSadler:KTBlank:C.377-93